RECORD AND BRIEFS

No. 16-1498

Supreme Court, U.S.
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In The
Supreme Court of the United States

WASHINGTON STATE
DEPARTMENT OF LICENSING,

Petitioner,

v.

COUGAR DEN, INC.,
A YAKAMA NATION CORPORATION,

Respondent.

On Petition For Writ Of Certiorari
To The Supreme Court Of Washington

BRIEF OF *AMICUS CURIAE* CONFEDERATED TRIBES AND BANDS OF THE YAKAMA NATION IN SUPPORT OF RESPONDENT

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INTEREST OF *AMICUS CURIAE*[1]

The Confederated Tribes and Bands of the Yakama Nation ("Yakama Nation") is a federally recognized Indian Tribe that has inhabited and occupied the mid-Columbia River Basin since time immemorial. Long before the Yakama People first encountered American settlers, they were "inveterate traders" with extensive trading practices and territory. *Yakama Indian Nation v. Flores*, 955 F. Supp. 1229, 1238 (E.D. Wash. 1997), *aff'd*, 157 F.3d 762 (9th Cir. 1998). Their trading practices included trade with travelers entering Yakama territory, as well as trade that occurred well beyond their lands. *Yakama Indian Nation*, 955 F. Supp. at 1238.

The significance of the Yakamas' trading practices was recognized during the United States Government's treaty negotiations near present day Walla Walla, Washington. *Id.* at 1264. On June 9, 1855, the United States Government and the leaders of fourteen Indian tribes and bands entered into a treaty, the Treaty With the Yakamas. 12 Stat. 951 (June 9, 1855, ratified March 8, 1859, proclaimed April 18, 1959).

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[1] Counsel of record for all parties received notice at least 10 days prior to the due date of *amicus curiae*'s intention to file this brief, and the parties have consented to its filing. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity other than *amicus curiae*, its members or its counsel made a monetary contribution to its preparation or submission.

As the sovereign government primarily responsible for the regulation, administration and protection of those rights guaranteed to it in 1855, the Yakama Nation's interest in this appeal is the proper interpretation of the Yakama Treaty and how it applies to Cougar Den, Inc. ("Respondent"), a Yakama-owned business that is licensed and regulated by the Yakama Nation, and to the Washington State Department of Licensing ("Petitioner"). The Yakama Nation must and will intercede as a litigant or *amicus curiae* to defend the Yakamas' treaty rights when a party, such as the State government here, overreaches in a disingenuous attempt to fundamentally alter those solemn commitments the United States Government made to the Yakama People in 1855.

SUMMARY OF ARGUMENT

For over 100 years, Washington State has sought to limit the rights guaranteed to the Yakamas by the Yakama Treaty. See, *e.g.*, *United States v. Winans*, 198 U.S. 371 (1905); *State v. Towessnute*, 154 P. 805 (Wash. 1916); *Tulee v. State of Washington*, 315 U.S. 681 (1942). The Petition for Writ of Certiorari before this Court is simply an extension of Washington State's continuing efforts to limit the Yakama Treaty.

Over the past two decades, Washington State has repeatedly assaulted the Yakama Treaty's Article III right to travel provision. See, *e.g.*, *Cree v. Waterbury*, 78 F.3d 1400 (9th Cir. 1996) ("*Cree I*"); *Yakama Indian*

Nation, 955 F. Supp. 1229; *Cree v. Flores*, 157 F.3d 762 (9th Cir. 1998) ("*Cree II*"); *United States v. Smiskin*, 487 F.3d 1260 (9th Cir. 2007); *King Mountain Tobacco Co. v. McKenna*, 768 F.3d 989 (9th Cir. 2014). Petitioner continues this assault, carrying forward Washington State's centuries-old pattern of aggression against the Yakama Treaty.

Time and again courts – including the Washington Supreme Court in this matter – have held that the Yakama Treaty's right to travel provision unambiguously "guarantee[s] the Yakamas the right to transport goods to market" for "trade and other purposes." *Cree II*, 157 F.3d at 769. This is the case regardless of what "goods" are being transported. *Smiskin*, 487 F.3d at 1268. If a state fee or restriction interferes with the right to transport, then it is *per se* invalid. *Id.*

Washington State's current fuel tax scheme, enacted in 2007, was deliberately tailored by the state legislature to target the Yakama Nation, the Yakama People, and Yakama businesses in an effort to circumvent the protections guaranteed by the Yakama Treaty. Pet. 5-6. As implemented, the fuel tax scheme levies a tax and imposes licensing requirements on a specific activity – the act of importing fuel, i.e., transporting fuel, into Washington State. Despite the challenge filed by Petitioner, the Washington Supreme Court found such statutory scheme to violate federal law. Pet. 14a, 16a.

As held by the Washington Supreme Court, interpretation of the Yakama Treaty under controlling

canons of interpretation confirms that the Yakama Treaty is a federal law that exempts Yakamas from taxes and licensing requirements that place restrictions on the Yakama Peoples' use of public highways. Pet. 4a, 14a, 16a. In its review of this highly fact-bound matter, the Washington Supreme Court found travel on public highways to be directly at issue because the fuel tax scheme placed a tax on the "transportation of fuel", and "[h]ere, it was simply not possible for [Respondent] to import fuel without traveling or transporting that fuel on public highways." Pet. 16a. Not only did the Washington Supreme Court rightfully reject Petitioner's assertion that Respondent was not being taxed for using public highways, it reached its decision after evaluating the body of precedent developed in the Ninth Circuit and found any alleged conflict to be distinguishable on the facts. Pet. 6a-14a.

Petitioner once again seeks to narrow Yakama Treaty rights while expanding its authority. Petitioner asks this Court to reject the Washington Supreme Court's routine application of well-settled law regarding Indian treaty interpretation. Petitioner asks this Court to take a highly fact-bound matter and find conflict where none exists. Finally, based on unfounded assertions of States' interests and unpredictability created by the Washington Supreme Court's decision, Petitioner asks this Court to ignore available remedies and to instead reverse a century of thoughtful judicial practice and abrogate rights guaranteed by the United States Government to the Yakama Nation and its people in 1855.

Petitioner asks too much, and its groundless invitation to this Court to review the Washington Supreme Court's decision should be denied.

REASONS FOR DENYING THE PETITION

I. The Petition Asks this Court to Reject the Washington Supreme Court's Routine Application of Well-Settled Law Regarding Indian Treaty Interpretation

The ruling by the Washington Supreme Court follows this Court's precedent requiring Indian treaties in general, and the Yakama Treaty in particular, to be interpreted as the Indians understood the treaty terms when courts are addressing treaty-based challenges to state regulation.

This Court has repeatedly held that the interpretation of Indian treaties is subject to canons of construction favorable to the Indian party. See, *e.g.*, *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 227 (1985); *Choctaw Nation v. United States*, 318 U.S. 423, 431-32 (1943). Under these canons, treaties are interpreted broadly and the text of a treaty must be construed as the Indians would naturally have understood it at the time of the treaty, with doubtful or ambiguous expressions resolved in the Indian's favor. *Winans*, 198 U.S. at 380-81 ("we have said we will construe a treaty with the Indians as [the Indians] understood it"); *Tulee*, 315 U.S. at 684-85 ("It is our responsibility to see that the terms of the treaty are

carried out, as far as possible, in accordance with the meaning they were understood to have by the tribal representatives at the council"). Sources beyond the treaty necessarily aid that interpretation. *Winans*, 198 U.S. at 381 ("How the treaty in question was understood may be gathered from the circumstances").

Petitioner asserts that the Washington Supreme Court's treaty analysis conflicts with this Court's precedent. Pet. 25. There is no support in the record for Petitioner's untenable assertion.

The Washington Supreme Court acknowledged that state taxes and licensing requirements apply to the Yakamas "[a]bsent express federal law to the contrary," and rightfully concluded that the Yakama Treaty constitutes such express federal law. Pet. 4a (quoting *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148-149 (1973)); See *also*, *Cree I*, 78 F.3d at 1403 ("A treaty can constitute such an express federal law"); *Foster v. Neilson*, 27 U.S. 253, 314 (1829) (explaining that a treaty is the "law of the land" and is "to be regarded in courts of justice as equivalent to an act of the legislature").

The Washington Supreme Court observed that the issue before it centered "on the interpretation of the 'right to travel' provision in the [Yakama] treaty, in the context of importing fuel into Washington State." Pet. 1a. Appropriately, the Washington Supreme Court followed this Court's well-settled rule of Indian treaty interpretation and applied these canons in its examination of the Yakama Treaty's text and its assessment

of the factual record regarding the historical meaning of the right to travel provision developed in *Cree I*, *Yakama Indian*, *Cree II*, *Smiskin*, and *King Mountain*. Pet. 5a-12a.

The Washington Supreme Court rightfully concluded that Petitioner's erroneous "interpretation of the [right to travel] treaty provision ignore[d] the historical significance of travel to the Yakama," and similarly ignored "the rule of treaty interpretation" established by this Court. Pet. 6a. The Washington Supreme Court held that "the right to travel provision in the treaty protects the [Yakama]'s historical practice of using the roads to engage in trade and commerce." Pet. 14a. It also held that, here, the right to travel provision of the Yakama Treaty had been implicated as "any trade, traveling, and importation that requires the use of public roads fall[s] within the scope of the right[s]" guaranteed by the Yakama Treaty. Pet. 16a.

Not only did the Washington Supreme Court rule correctly, it demonstrated no conflict with this Court's holdings that warrants this Court's review. The Washington Supreme Court's decision was well reasoned and correctly applied this Court's well-settled rule of Indian treaty interpretation.

II. The Petition Asks this Court to Take a Highly Fact-Bound Matter and Find Conflict Where None Exists

Petitioner asserts that the Washington Supreme Court and the Ninth Circuit are split. Pet. 13. Despite the assertion, the conflict alleged is not present here because the Washington Supreme Court based its decision on specific and distinguishable facts. In ruling in Respondent's favor, the Washington Supreme Court evaluated the body of precedent developed in the Ninth Circuit, found any alleged conflict to be distinguishable on the facts, and concluded that Petitioner's arguments to the contrary were unpersuasive. Pet. 6a-13a.

The Washington Supreme Court rightly rejected Petitioner's argument that the specific facts presented in this matter were more similar to *King Mountain*, observing that under the facts of *King Mountain*, the right to travel provision in the Yakama Treaty was "not implicated" because the specific economic activity that was the subject of *King Mountain* did "not involve travel on public highways." Pet. 13a.

In contrast, the Washington Supreme Court evaluated the specific facts presented to it and found them to be "nearly identical" to the facts presented in *Smiskin* as both involved "travel on public highways," and in both instances "the State placed a condition on that travel, which affected the Yakamas' treaty right to transport goods to market without restriction." *Id.* The Washington Supreme Court also found such restriction to be more than simple regulation of a Treaty protected

activity, with the licensing requirement here serving as a vehicle for tax collection, just as the pre-notification requirement had served in *Smiskin*. Pet. 14a.

In recognition of the critical distinctions between *King Mountain* and *Smiskin*, the Washington Supreme Court distinguished Ninth Circuit precedent, correctly concluded that *Smiskin* controls, and provided explanation for why the conflicts alleged by Petitioner did not prove that other courts would reach different decisions if faced with the same or very similar facts. Pet. 13a-14a. Given this reconciliation of Ninth Circuit precedent, there is no conflict that warrants this Court's review.

III. The Petition Asks this Court to Ignore Available Remedies and Judicially Expand States' Authority to Tax Based on Unfounded Assertions of States' Interests and Unpredictable Impacts

Petitioner advocates for a major shift in authority and proposes that this Court narrow the commitments made to the Yakama Nation in 1855 in order to save the States from loss of imaginable future revenues generated by imposition of unlawful taxes and penalties. Pet. 29-30. Petitioner similarly claims that such action is necessary to shield the States from a guarantee of unpredictability created by the Washington Supreme Court's decision. Pet. 30-31. This overreach by Petitioner has become an all too common and

disingenuous argument that the Yakama Nation must unwaveringly defend against to protect the Yakamas' treaty rights.

In carrying forward Washington State's two-decade assault on the Yakama Treaty's right to travel provision, Petitioner describes to this Court generalized allegations of harm to taxpayers, competitive disadvantages faced by businesses, and loss of state revenue resulting from the Yakamas exercise of the Yakama Treaty's right to travel provision. Pet. 24, 29. Petitioner raised similar concerns before the Washington Supreme Court, claiming that a finding in favor of Respondent would lead to "unimagined and unintended preemption of fundamental state powers." Pet. 14a. The Washington Supreme Court summarily rejected this assertion, holding that this matter does not present the "parade of horribles" concern raised by Petitioner. Pet. 16a. Unfounded assertions of States' interests and unpredictable impacts by Petitioner do not and cannot demonstrate why this matter merits this Court's review.

Antithetical to Petitioner's generalized allegations, Petitioner has asserted good reason for this Court to not review the Washington Supreme Court decision. If States are unable to enforce a tax because the legal incidence is on Indians or Indian tribes in violation of federal law, then States are free to amend their laws to shift the tax's legal incidence. See *e.g.*, *Oklahoma Tax Commission v. Chickasaw Nation*, 515 U.S. 450 (1995). Petitioner acknowledges that such statutory lawmaking is an available remedy to its taxation

problem presented here, with the state legislature having enacted a similar curative measure in 2007 that resulted in Washington State's current fuel tax scheme. Pet. 5-6. Such available remedy provides sufficient reason for this Court to deny the Petition.

Rather than accept this remedy to its taxation concern, Petitioner would instead have this Court step into the shoes of both Congress and the state legislature to judicially abrogate treaty rights guaranteed to the Yakama People. The Washington Supreme Court refuted a similar assertion. Not only did it reject Petitioner's generalized allegation of an unfounded "parade of horribles" that would beset the States absent judicial treaty reform, the Washington Supreme Court rightfully held that "[i]f the State has concerns about [the Yakama Treaty right to travel] provision, only Congress can revise or restrict the provisions, not this court." Pet. 16a.

Absent clear congressional commands, Petitioner's goal of treaty reform must yield to the United States Government's interest in honoring the solemn commitments made to the Yakama Nation in 1855.

CONCLUSION

The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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